160 US 654

160-654

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~425~~. 138

THE UNITED STATES, APPELLANT,

vs.

ROBERT THORNTON.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 21, 1892.

(15086.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 425.

THE UNITED STATES, APPELLANT,

vs.

ROBERT THORNTON.

APPEAL FROM THE COURT OF CLAIMS.

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1736

1 *Petition.—Filed September* 12, 1890.

I.

Petition.—Filed September 12, 1890. J. R.

To the Honorable Judges of the Court of Claims:

The petition of Robert Thornton sets forth and shows, to wit:

That he enlisted as a private in the United States Marine Corps, November 10, 1886, at Mare Island, California, to serve five years, and was discharged March 13, 1889, at Washington, D. C., by order of the Secretary of the Navy.

That, under the provisions of section 1290, Revised Statutes of the United States, he was entitled to receive transportation and subsistence or travel pay and commutation of subsistence from place of discharge to that of enlistment. This has not been paid to him, and is still due. Your petitioner further shows that he made written application to the Fourth Auditor of the Treasury for the said due, in March, 1889, and in May, 1890, received from him a communication informing petitioner that his claim "was adjusted in February last, and transmitted to the Second Comptroller, who declined to allow the case, on the grounds that he was discharged at his own request before the expiration of the term of his enlistment."

Your petitioner prays as follows:

That this honorable court adjudge and decree that the United States pay to him transportation and subsistence or travel pay and commutation of subsistence from Washington, D. C., to Mare Island, California.

ROBERT THORNTON.

L. C. WILLIAMSON,
Attorney for Petitioner,
492 *Louisiana Avenue, Washington, D. C.*

I do solemnly swear that I have read the above petition by me subscribed and know the contents thereof, and that the facts therein stated, upon my personal knowledge, are true, and those stated upon information and belief I believe to be true.

ROBERT THORNTON.

Subscribed and sworn to before me this 4th day of August, 1890.
[SEAL.] L. I. O'NEAL,
Notary Public.

2 II.

General traverse.—Filed October 7, 1890.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the

United States, and ha not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney-General.

3 III.

Findings of fact.—Filed May 31, 1892.

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

The claimant enlisted, at the age of 13 years 1 month and 3 days, in the Marine Corps of the United States, at Washington, D. C., on August 29, 1878, for a term of 7 years 10 months and 27 days, and was then "bound to learn music" in said corps.

April 17, 1880, he was rated as a drummer.

November 6, 1886, he was discharged from the service at Mare Island, California, as a drummer.

November 10, 1886, he reenlisted at Mare Island, California, as a private in said corps for a term of five years.

On March 13, 1889, before the expiration of the last-mentioned term of enlistment, Thornton, as a private in said corps, was, at his own request, and not by way of punishment for an offense, discharged from service at the Marine Barracks, Washington, D. C., by direction of the Secretary of the Navy.

The claimant was settled with in full for all pay and allowances except transportation and subsistence in kind, or, in lieu thereof, travel pay and commutation of subsistence, from Washington, D. C., the place of his discharge, to Mare Island, California, the place where he had reenlisted. And when he was discharged, at the end of his term of enlistment, he received travel pay and commutation of subsistence computed at the rate of one day for every 20 miles of the distance from Mare Island, California, to Washington, D. C.

II.

The travel pay and commutation of subsistence of a private in the Marine Corps when discharged in the third year of his second term of enlistment, and when he is allowed the same, are stated by the proper accounting officers of the Treasury Department to be one day's pay at 60 cents per day, and one ration commuted at 30 cents for each 20 miles of the distance from place of discharge to place of last enlistment; and in the settlement of accounts they adopt 3,136 miles as the distance from Washington, D. C., to Mare Island, California.

According to this practice, the travel pay and commutation of subsistence on such a discharge would be for—

157 days' pay, at 60 cents	$94.20
157 rations, at 30 cents	47.10
Total	141.30

III.

Under a long-standing construction by the accounting officers of the Treasury Department of the law embraced in section 1290 of the Revised Statutes, it has been the practice to refuse travel pay and commutation of subsistence to enlisted men from the place of their discharge to the place of enlistment, when they have been discharged at their own request prior to the expiration of their term of enlistment.

The only exception made under this practice is when an enlisted man is discharged at his own request after twenty years of faithful service. (Army Regulations, 1863, par. 163.)

IV.

Before bringing suit here the claimant presented the claim set forth in his petition to the proper accounting officers of the Treasury Department, and it was disallowed in accordance with the practice mentioned in Finding III.

4 IV.

Conclusion of law.—Filed May 31, 1892.

CONCLUSION OF LAW.

The court, upon the foregoing findings of fact, decides as a conclusion of law as follows:

The claimant is entitled to recover of the defendants the sum of one hundred and forty-one dollars and thirty cents ($141.30).

5 V.

Opinion.—Filed May 31, 1892.

OPINION.

NOTT, J., delivered the opinion of the court:

The claimant originally enlisted in the Marine Corps, at Washington, in 1878. He was discharged at Mare Island, Cal., in 1886, but immediately reenlisted for a term of five years. In 1889 he was discharged at Washington by order of the Secretary of the Navy, two years before his term of enlistment had expired, upon his own request. No condition upon his discharge was imposed by the Secretary, except that it was to be "upon settlement of his accounts." He sought commutation or traveling expenses in place of transportation from Washington, the place of his dis-

charge, to Mare Island, the place of his last enlistment. It was refused by the Second Comptroller upon the following grounds:

"Since 1832 it has been the practice of the accounting officers and the War Department to refuse in all cases traveling allowances to soldiers discharged at their own request and for their own convenience. The expression of the law that 'when a soldier is discharged from the service' has reference to an involuntary discharge, and not to a case where the soldier is discharged upon his own request."

The law upon which the claimant rests his demand is Revised Statutes, § 1290, which, as amended by the Act 27th February, 1877 (19 Stat. L., p. 244), is in these words:

"When a soldier is discharged from the service, except by way of punishment for an offense, he shall be allowed transportation and subsistence from the place of his discharge to the place of his enlistment, enrollment, or original muster into the service."

The ambiguity of the statute was brought into it by an amendment. Originally it read that "When a soldier is honorably discharged from the service he shall be allowed transportation, etc., etc. The act of 1877 struck out the word 'honorably' and introduced the words 'except by way of punishment for an offense.'" As it now stands, it expressly declares one single exception, and seems to imply that in all other cases whatsoever the discharged soldier shall be allowed transportation and subsistence from the place of his discharge to the place of his enlistment. The law and usage, therefore, was from 1832 to 1877 that a soldier should not receive transportation from the place of his discharge to the place of his enlistment if his discharge at that place was brought about by his own request. The usage, if not the law, since 1877 has continued to be that a soldier will not receive transportation unless the discharge was brought about by the expiration of the term of enlistment or by the voluntary action of the Government.

The term "honorably discharged" frequently appears in the statutes and in military orders and correspondence; but the form of the discharge given to soldiers does not use the term "honorable" or "honorably," or dishonorable or dishonorably. The Army Regulations, 1863, 165, 166, provided that blank discharges on parchment would be furnished from the Adjutant-General's office, and that the cause of the discharge would be stated in the body of the discharge. It was therefore frequently a question with courts and accounting officers whether a soldier was or was not honorably discharged. In Kelly's Case (5 C. Cls. R., 476–483), the Second Comptroller held "that the document itself not saying whether the discharge was honorable or dishonorable, the fact must be determined by proof;" and he held that the discharge was dishonorable; but the Adjutant-General certified that the instrument was in the usual form of discharge given to honorably discharged soldiers.

The amendment enacted by the act of 1877, in striking out the word "honorably" and at the same time inserting the words "except by way of punishment for an offence," was undoubtedly intended to relieve courts and accounting officers from the embarrassment of determining whether a discharge was honorable or dishonorable. The question now is whether the amendment did more than this—whether it overruled the rulings and usage of the accounting officers for a period of 45 years and gave, or was

intended to give, transportation to soldiers whose discharge at the time and place of discharge was of their own seeking—was a favor and not a right.

Whatever may have been the understanding of the committee which reported the amendment, or the members who voted for it, the court must take the intent of Congress as it stands expressed in the statute which they have made. As the law stood by departmental construction of more than 45 years of unquestioned usage, a soldier honorably discharged was entitled to transportation from the place of his discharge to the place
6 of his enlistment, except in cases where he was discharged before the expiration of his term of enlistment at his own request. The amendment came and changed the law as thus administered. The reenacted law declares an exception which is not the exception of the executive departments. Exceptio probat regulam. Where a statute declares one exception the judiciary can not declare that another was intended. Here the statute as amended declares that "when a soldier is discharged from the service" "he shall be allowed transportation and subsistence from the place of his discharge to the place of his enlistment," "except" when his discharge is "by way of punishment for an offense." In this case the discharge not having been for the punishment of an offence the case came within the rule and not within the exception.

The judgment of the court is that the claimant recover of the defendants the sum of $141.30.

7 VI.

Final judgment.

At a Court of Claims held in the city of Washington on the 31st day of May, A. D. 1892, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge and decree that the said Robert Thornton, do have and recover of and from the United States the sum of one hundred and forty-one dollars and thirty cents ($141.30).

8 VII.

Defendants' application for and allowance of appeal.

From the judgment rendered in the above-entitled cause on the 31st day of May, 1892, in favor of claimant, the defendants, by their attorney-general, on the 27th day of June, 1892, make application for, and give notice of an appeal to the Supreme Court of the United States.

JOHN B. COTTON,
Asst. Attorney-General.

Filed and allowed in vacation July 13, 1892.

WILLIAM A. RICHARDSON,
Chief Justice.

9 In the Court of Claims.

ROBERT THORNTON, }
v. } No. 16818.
THE UNITED STATES. }

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact of the court, and the conclusion of law thereon, of the opinion of the court, of the judgment of the court of the application of the defendants for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this thirteenth day of July, A. D. 1892.

[SEAL.] ARCHIBALD HOPKINS,
Chief Clerk.

10 (Indorsement on cover:) Case No. 15086. Term No. 425. The United States, appellant, vs. Robert Thornton. Court of Claims. Filed July 21, 1892. Supreme Court U. S. Clerk's office. Received Jul' 21, 1892.

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Office Supreme Court U. S.
FILED.
OCT 28 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, APPELLANT,
v.
ROBERT THORNTON.
No. 138.

BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, APPELLANT, v. ROBERT THORNTON. } No. 138.

BRIEF FOR APPELLANT.

STATEMENT.

The claimant, Robert Thornton, originally enlisted and presumably was mustered into the Marine Corps at Washington, D. C., in 1878. At or about the expiration of his term of enlistment, to wit, November 6, 1886, he was discharged from the service at Mare Island, Cal., and was paid his commutation of subsistence and travel from the place of discharge to the place of enlistment at Washington, D. C. Within a few days after such discharge, to wit, November 10, 1886, he reenlisted at Mare Island, Cal., as private in said Marine Corps, for a term of five years. On March 13, 1889, before the expiration of his term of enlistment, and while then stationed at the Marine Barracks, Washington, D. C., he was discharged at his own request, and was paid in full all sums due him by the

Army Regulations, but was not paid or allowed the commutation for subsistence and travel from Washington to Mare Island, Cal., for which he now brings suit, and for which judgment was rendered in his favor by the Court of Claims in the sum of $141.30, from which judgment appeal is taken on behalf of the United States.

ASSIGNMENT OF ERROR.

I.

The Court of Claims erred in holding that the claimant was entitled, upon his being discharged from the service upon his own request before the expiration of his term of enlistment, to transportation and subsistence from the Marine Barracks at Washington, D. C., to Mare Island, in the State of California, or to commutation for such subsistence and travel pay.

II.

The Court of Claims erred in holding that the place of enlistment, enrollment, or original muster into the service of the claimant was Mare Island, Cal., instead of Washington, in the District of Columbia.

III.

The Court of Claims erred in rendering judgment for the claimant in the sum of $141.30, or any sum whatever.

IV.

The Court of Claims erred in refusing to enter judgment for the defendant dismissing the complaint.

ARGUMENT.

I.

The first, third, and fourth assignments of error present but a single question and may be argued together.

The claimant's right to recover is based upon the language of section 1290, Revised Statutes, as amended by the act of February 27, 1877 (19 Stat. L., 244), which provides, after being so amended—

> When a soldier is discharged from the service *except by way of punishment for an offense,* he shall be allowed transportation and subsistence from the place of his discharge to the place of his enlistment, enrollment, or original muster into the service. The Government may furnish the same in kind, but in case it shall not do so, he shall be allowed travel pay and commutation of subsistence for such time as may be sufficient for him to travel from the place of discharge to the place of his enlistment, enrollment, or original muster into the service, computed at the rate of one day for every twenty miles.

This statute as it now reads is identical as to the material words with the statute existing from the year 1812 (2 Stat. L., 674) up to the enactment of the Revised Statutes, a fact which was not brought to the notice of the Court of Claims by the printed briefs of either party, and apparently was not understood to exist by that court. Nott, J., appears from his opinion to have understood that the act of 1877, whereby the words "discharged from the service except by way of punishment for an offense," were substituted for the words "honorably discharged from the service," in the Revised Statutes, was in that

respect entirely new and changed the language which had existed from the earliest days up to 1877.

The departmental construction dating back at least to the year 1832, presumably much further, had declared uniformly and consistently that an enlisted man, who, by his own request and for his own convenience, was released from service (the only method of such release being in the form of a discharge) before the expiration of the term of his enlistment, did not come within the provision here relied on. Of that practice this court takes judicial notice. (*Caha* v. *U. S.*, 152 U. S., 211–222; *Knight* v. *Land Ass'n*, 142 U. S., 161–169; *Jones* v. *U. S.*, 137 U. S., 202–214.)

It is expressly declared in a communication of Second Comptroller Thornton to the Paymaster-General of April 7, 1832, with reference to the case of Smith and Price, as follows:

> I am of opinion that soldiers so discharged from the Army are not entitled to traveling pay or rations from the place of discharge to their place of residence, because such discharges are never granted but at the request of the soldier and for his own pleasure and convenience.

The persistency of this custom is further established by the communication of Second Comptroller Brodhead, to Second Auditor Clayton, of date April 28, 1855, in which he says:

> The principle in the case of Bridges, submitted by you, presenting the question of a right to mileage, etc., to soldiers discharged at their own request before the expiration of their terms of enlistment,

was substantially decided by Comptroller Thornton on the 7th of April, 1832, in a letter to the Paymaster-General, of which a copy was sent to the Second Auditor. In that letter he said [here follows the foregoing quotation].

The soldier under such circumstances asks and obtains a release from his contract of enlistment, and the other party, the United States, in assenting must be held to be released from any correlative obligation to him.

If a soldier, who is discharged at his own request, not in consequence of sickness, but for his own convenience, can receive traveling pay to his residence the process might be repeated with a recruit enlisted in his place, and so on, to the pecuniary detriment of the United States. Such a policy is not legal or equitable, and can not be sanctioned.

Its continuance up to the present time is declared in a communication from the Second Comptroller, of date November 8, 1894, in which he says:

> The rule which has obtained for more than sixty years, that the law contemplates an involuntary discharge or a discharge on completion of the contract, and that an officer or enlisted man, who is released from the service for his own pleasure or convenience, although such release is called a discharge, is not entitled to travel pay, is still adhered to by the accounting officers.

The force of long continued departmental construction of an act is to be received as of great weight. (*U. S.* v. *Hill*, 120 U. S., 169; *U. S.* v. *Philbrick*, ib., 52; *U. S.* v. *Johnston*, 124 id., 236; *Heath* v. *Wallace*, 138 id., 573; *Pennoyer* v. *McConnaughy*, 140 id., 1–23.)

More especially is such unbroken departmental construction well nigh conclusive when after a departure therefrom, the same language is again adopted in legislation. That is the present case. Under the law continuing from 1812 down to the enactment of the Revised Statutes in 1874, the law provided that a soldier "*discharged from the service except by way of punishment for an offense,*" should be allowed transportation, etc. By departmental construction of at least forty years this did not entitle a soldier released from service by discharge at his own request to such an allowance.

In 1874 Congress changed the language of this provision by providing that "when a soldier is *honorably* discharged from the service he shall be allowed transportation, etc.," which continued to be the statute law until 1877, when some uncertainties having arisen as to the exact significance of the words "honorably discharged from the service," Congress returned to the language which had been in use from 1812 to 1874, and is, of course, presumed to have done this with full knowledge of the construction which had been persistently given to that language during that period, and in so doing as much readopted the exemption of a man who was discharged at his own request before the expiration of the term of his enlistment as it did the words "except by way of punishment for an offense."

The rule that the reenactment of an old statute adopts the construction placed upon it when formerly existing is analogous to and supported by the same reasons as the rule that the enactment of a statute from another State

brings with it the construction there given the same language. (*Metropolitan Railroad Co.* v. *Moore*, 121 U. S., 572; *McDonald* v. *Hovey*, 110 *id.*, 619.)

The act of 1877 was passed for the sole and express purpose of returning to the law as it existed before the Revised Statutes. It provides as follows: "Be it enacted, that for the purpose of correcting errors and supplying omissions in (Revised Statutes) the following amendments are hereby made therein."

The amendment of section 1290, as appears by the report of the committee upon the bill, was based upon the recommendation of the Paymaster-General, found at page 9, House Ex. Doc. No. 36, first session Forty-fourth Congress, in the following words:

> *Sections 1289 and 1290.*—The act of January 29, 1813, says: "Whenever any officer or soldier shall be discharged from the service, *except by way of punishment for an offense*, he shall be allowed," etc. This condition is in practice different from the condition in the Revised Statutes: "When an officer or soldier is honorably discharged," etc. The discharge of a soldier does not in terms express whether he is honorably or dishonorably discharged. The old language is more precise and better understood. It refers to the cause of his discharge, and not his history as a soldier.

The error into which the Court of Claims fell was in supposing that in 1832 and in 1855, and through all the period prior to 1874, this statute had read as it read in the Revised Statutes, and that therefore the adoption of the change from "honorably discharged" to "discharged except by way of punishment for an offense,"

indicated a purpose in Congress to make a new and different definition of those who were to receive this allowance. This misunderstanding and error is fully evidenced by the language of the opinion on page 4 of the record, in which the court says:

> The law and usage, therefore, was from 1832 to 1877 that a soldier should not receive transportation from the place of his discharge to the place of his enlistment if his discharge at that place was brought about by his own request. The usage, if not the law, since 1877 has continued to be that a soldier will not receive transportation unless the discharge was brought about by the expiration of the term of enlistment or by the voluntary action of the Government.
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> * * * * *
>
> The amendment enacted by the act of 1877, in striking out the word "honorably" and at the same time inserting the words "except by way of punishment for an offense," was undoubtedly intended to relieve courts and accounting officers from the embarrassment of determining whether a discharge was honorable or dishonorable. The question now is whether the amendment did more than this—whether it overruled the rulings and usage of the accounting officers for a period of forty-five years and gave, or was intended to give, transportation to soldiers whose discharge at the time and place of discharge was of their own seeking—was a favor and not a right.
>
> Whatever may have been the understanding of the committee which reported the amendment, or the members who voted for it, the court must take the intent of Congress as it stands expressed in the statute which they have made. As the law stood, by departmental construction of more than forty-five years of unquestioned usage, a soldier honorably dis-

> charged was entitled to transportation from the place of his discharge to the place of his enlistment, except in cases where he was discharged before the expiration of his term of enlistment at his own request.

Obviously the entire argument upon which the Court of Claims based its conclusion falls to the ground in view of this misapprehension of the language of the statute upon which this departmental construction had been predicated.

Another consideration fatal to the claimant's contention is, that he himself having requested, as a privilege and favor, the vacating of his contract of enlistment, with full knowledge, presumptively at least, of the understanding on the part of the Government that consent thereto carried with it immunity from liability to the claimant for transportation etc., has waived the right, if any existed, in his favor by the strict construction of the statute, to demand these allowances.

The relationship established by the enlistment, so far as the mutual duties and obligation to pay are concerned, is purely contractual. (*U. S.* v. *Kingsley*, 138 U. S., 87–90.) The claimant had his choice to continue and fulfill his contract and earn the right of transportation if given by the statute, or he had the right to surrender it in accordance with the departmental customs, as a condition of obtaining release from his contract of service.

II.

This case presents a claimant who is entirely outside of the equities and obvious purpose of this statute. The law originally provided (January 11, 1812, 2 Stat. L.,

674; January 29, 1813, 2 Stat. L., 796) that the travel and subsistence should be allowed from the place of discharge to the place of residence of the claimant, and not until the Revised Statutes, section 1290, did Congress substitute for "place of residence," the expression "place of enlistment, enrollment, or original muster into the service," the purpose of which doubtless was to protect against uncertainty as to the place of residence of a soldier, but persisted in the idea that when the Government was through with the service of a soldier he should be returned at public expense to the place from which he was taken.

This claimant originally enlisted and was originally mustered into the service at Washington, D. C., and when discharged at the end of his term of service, he applied for and received transportation and subsistence, or commutation thereof, back to Washington, and after being reenlisted at Mare Island, when the exigencies of his service brought him back to Washington, although he had yet two more years to serve under his contract, he applied for and obtained, as a favor, the privilege of withdrawing from the service of the United States at that place. From all of these acts no other inference can result than that Washington was the place to which the claimant had always intended to return whenever he left the service of the United States. The purpose of the statute, therefore, gives him no equity to demand transportation again across the continent to a place where there is no probability whatever of his going. There can be no doubt that, had he been offered transportation and subsistence in kind from Washington to Mare Island, at

the time of his release from enlistment, he would have declined the tender.

The service of the claimant was for all practical purposes continuous from the time of his original enlistment and muster into the service in August, 1878, at Washington, D. C., up to the time of his release in March, 1889, at the same place. The term of his first enlistment expired on November 6, 1886, and on November 10 he had again reenlisted. The continuity of such service where one enlistment follows upon the expiration of another, is recognized in various portions of the statute, the Articles of War and Army Regulations, which give additional rights, privileges, and payments to soldiers who are in their second or third enlistments. The fact that such brief interruptions of a service otherwise continuous does not prevent such service from being treated as continuous was declared by this court in the two cases of *U. S.* v. *Alger* and *U. S.* v. *Stahl* (152 id., 384).

It seems therefore that it is by no means a strained construction of the statute to hold that if the technical place of enlistment differs from the place of original muster into the service, that the statute is fully satisfied when the discharged soldier is given transportation back to the latter place, that of originally entering upon a service which has been continuous thereafter.

The appellant therefore respectfully submits that the judgment of the Court of Claims should be reversed and the petition dismissed.

JOSHUA ERIC DODGE,
Assistant Attorney-General.

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